91-783 (2)

No. 90-________

IN THE

Supreme Court of the United States

October Term, 1991

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO and LOCAL UNION NO. 4,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CARY RODMAN COOPER
Counsel of Record
MARGARET J. LOCKHART
COOPER, STRAUB, WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624
(419) 241-1200
Attorneys for Petitioner

Of Counsel:
R. JEFFREY BIXLER
One SeaGate, 23rd Floor
Toledo, Ohio 43666

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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APPENDIX

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Dated July 23, 1991)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5159

GLASS, MOLDERS, POTTERY, AND ALLIED
ALLIED WORKERS INTERNATIONAL UNION;
AFL-CIO; LOCAL UNION #4

v.

OWENS-ILLINOIS, INC.;

OWENS-ILLINOIS, INC.;
counter-claimant

v.

GLASS, MOLDERS, POTTERY, AND ALLIED
ALLIED WORKERS INTERNATIONAL UNION;
AFL-CIO; LOCAL UNION #4
counter-defendant

OWENS-ILLINOIS, INC.

v.

GLASS, MOLDERS, POTTERY, AND ALLIED
ALLIED WORKERS INTERNATIONAL UNION;
AFL-CIO, CLC
Owen-Illinois, Inc.
Appellant

Appeal from the United States District
Court for the District of New Jersey
(Civil Action Nos. 90-03236 and 90-03291)
District Judge: Honorable John F. Gerry

Argued on July 16, 1991

BEFORE: SLOVITER, *Chief Judge,* GREENBERG and SEITZ, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs shall be taxed against appellant.

By the Court,

/s/ SEITZ
Circuit Judge

ATTEST:

/s/ SALLY MRVOS
Clerk

OPINION OF THE UNITED STATES DISTRICT COURT

(Filed February 4, 1991)

NOT FOR PUBLICATION

Civ. Nos. 90-3236, 3291 (MHC)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GLASS, MOLDERS, POTTERY, PLASTICS
and ALLIED WORKERS INTERNATIONAL UNION,
AFL-CIO and LOCAL UNION NO. 4,
Plaintiffs,

v.

OWENS-ILLINOIS, INC.,
Defendant.

and

OWENS-ILLINOIS, INC.,
Plaintiff,

v.

GLASS, MOLDERS, POTTERY, PLASTICS
and ALLIED WORKERS INTERNATIONAL
UNION, AFL-CIO,
Defendant.

OPINION

APPEARANCES:

James Katz, Esquire
Robert F. O'Brien, Esquire
Tomar, Simonoff, Adourian & O'Brien
41 South Haddon Avenue
Haddonfield, New Jersey 08033

James F. Hammill, Esquire
McCarter & English
The Commerce Center
1810 Chapel Avenue West
Cherry Hill, New Jersey 08002

GERRY, *Chief Judge*:

Presently before the Court is a motion for summary judgment by plaintiffs, Glass, Molders, Pottery, Plastics and Allied Workers International Union AFL-CIO and its Local Union Number 4 (collectively "the Union") to enforce an arbitration award and for prejudgment interest, costs and reasonable attorneys fees, and a cross-motion for summary judgment by defendant, Owens-Illinois, Inc. ("Owens") to vacate the arbitration award. For the reasons set forth below, the Union's motion will be granted and Owens' cross-motion will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

A. Introduction

For over 25 years, Owens and the Union have been parties to a succession of collective bargaining agreements covering the terms and conditions of employment for employees of Owens' metal closure plant in Glassboro, New Jersey. The latest collective bargaining agreement which was in effect at all times material to this action became effective April 1, 1986,

and was to expire March 31, 1989. On or about January 5, 1989, however, Owens sold the Glassboro plant pursuant to an Asset Purchase Agreement ("the Agreement") entered into on November 14, 1988 between Owens and Anchor Hocking Corporation ("Anchor"). Anchor acquired the plant for approximately $36 million. As a condition of the sale, Section 13(b) of the Agreement expressly provided that Owens would absolve Anchor from assuming any obligation under any collective bargaining agreement.[1] The Agreement also provided that Anchor would have no obligation to hire any of Owen's Glassboro employees, but that Owens would nonetheless encourage its employees to work for Anchor. Additionally, Owens agreed not to solicit or offer employment to any employee for 180 days following the closing. Agreement, §13(a).

Anchor offered employment to all affected employees upon the sale of the plant. On January 5, 1989, there was a 100% turnout by the former Owens employees, and all were eventually hired by Anchor. Accordingly, there was no loss of work as a result of the sale. Anchor announced its intention to negotiate a new agreement with the Union as soon as possible and eventually entered into a

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[1] The relevant provision provides:

> *Employee Agreements, Including Collective Bargaining Agreements.* It is understood and agreed that this Agreement does not obligate Buyer to assume any of Seller's liabilities or obligations under any collective bargaining agreement or other employment agreement, express or implied, relating to persons employed by Seller, and that, even if Buyer elects to assume Seller's rights and prospective obligations under any such collective bargaining agreement or other employment agreement, in no event will Buyer assume any liability or obligation arising out of any such collective bargaining agreement or other employment agreement relating to any transaction, event or activity occurring or condition or state of facts existing at or prior to the time of the Closing.

new 3-year collective bargaining agreement commencing April 1, 1989. Prior to the new agreement, Anchor continued the current wage rate, however, knowing it was not bound by the Owens-Union collective bargaining agreement, instituted a number of changes in the terms of employment.[2] These changes included the elimination

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[2] Anchor posted the following press release to the new employees on January 5, 1989:

> It is my pleasure to inform you that effective today, Anchor Hocking Packaging Co., a division of Newell Co., has acquired Owens-Illinois' plant here in Glassboro, New Jersey. We are glad that we have combined your great product lines with Anchor Hocking's and we are enthusiastic about the future.
>
> As your prospective new employer, we offer employment to each and every one of you in accordance with this notice and the attached summary of changes. While we have chosen not to adopt the collective bargaining agreements between Owens-Illinois and the Glass, Molders, Pottery, Plastics & Allied Workers International Union, we will apply the working conditions set forth in those agreements . . . as modified by the changes described in detail in the attachment. Please read the attachment carefully. We would like you to note that all current wage rates are being continued and, other than slightly increased insurance premium contributions, no significant changes are being made in your basic fringe benefits.
>
> You may indicate your acceptance of the Company's offer of employment by continuing to report for work in accordance with your previously established schedule. Within the next few days, after we have hired a substantial and representative complement of employees, we will be able to determine whether the law permits us to recognize and bargain with the union. As soon as the law allows, we intend to commence negotiations with the union over the terms of an initial labor agreement. Naturally, during those negotiations, all terms and conditions of employment will be subject to bargaining.
>
> We are confident that each employee who accepts our offer for employment will enjoy being a part of the Newell family, and we encourage you to join with us in tackling the challenges of the future. If you have any questions, please raise them with your supervisor or direct them to the personnel office.
>
> /s/ WILLIAM K. DOPPSTADT
> Vice President, Human Resources

of severance pay, personal days off, a decrease in employer contributions to retiree benefits, and an increase in employee contributions to insurance plans. Specifically, the summary of changes included the following:

> *Side Agreement, Letters and Practices*—Are not binding on the Company.
>
> . . . .
>
> *Layoff Notice*—All requirements of advance notice for layoff, including but not limited to those set forth in Article 3 of Owens-Illinois' Union Shop Contract, are eliminated.
>
> . . . .
>
> *Subcontracting*—All restrictions against the Company's management right to subcontract, including but not limited to any restrictions set forth in Article 30 of Owens-Illinois' Union Shop Contract, are eliminated.
>
> *Article 28 of Owens-Illinois' Union Shop Contract*—All transfer, notice and other rights set forth in this Article are eliminated.
>
> *Special Call Assignments*—Any and all restrictions against the work that may be performed by employees summoned to work under a special call, including but not limited to all restrictions set forth in Article 5, Section 4(c) of Owens-Illinois' Local Union-Management Agreement, are eliminated.
>
> *Filling of Vacancies*—Any and all restrictions against the Company's management rights to fill vacancies, whether scheduled or unscheduled, including but not limited to those set forth in Section 1(g) of the Owens-Illinois' local Union-Management Agreement, are eliminated.
>
> . . . .

Arbitration—Upon lawful recognition of the union, the Company will propose an interim written agreement permitting the union to submit certain disputes to arbitration as a matter of right and reserving to the Company discretion to accept or decline requests to submit other disputes to arbitration. . . .

Successors, Transferrees and Assigns—All restrictions against the Company's management right to sell or transfer the plant, including but not limited to those set forth in Article 33 of Owens-Illinois' Union Shop Contract, are eliminated.

Cost of Living Allowances—Including but not limited to all terms and conditions set forth in Article 38 of Owens-Illinois' Shop Contract, are eliminated.

Personal Days Off—Are eliminated.

Vacation Pay—Accrued vacation pay will not be payable to employees discharged for cause.

Insurance—Employees will be required to contribute 15% of the total cost of the insurance plan selected by each employee. Further, all rights to Company paid insurance benefits following plant closure, including but not limited to all rights set forth in Article 21, Section 8(h) of Owens-Illinois' Union Shop Contract, are eliminated. . . .

Retiree Benefits—As set forth in Article 20 of Owens-Illinois' Union Shop Contract, will be continued. However, the Company will not contribute more than the currently required $.18 per employee hour actually worked.

Severance Pay—All rights to severance pay, including but not limited to all rights set forth in Article 31 of Owens-Illinois' Union Shop Contract, are eliminated.

There is some dispute as to when the Union became aware of the sale of the plant as well as the terms and conditions of the Agreement. The Union maintains that, although certain representatives of the Union heard about the Agreement in November of 1988, they were only informed that the sale was not final and was dependent upon governmental approval. They were not provided with a copy of the Agreement until four months after the closing. The Union further maintains that they were not consulted regarding the terms of the Agreement during the negotiation process. Owens alleges that the Union knew about the sale to Anchor approximately six weeks before the closing, and that Frank Cibo, the Union International Representative assigned to Glassboro, learned by telephone on January 3rd that the sale would be finalized on January 5th and that Anchor would not assume the collective bargaining agreement. Owens maintains, and the Union does not dispute, that the Union never undertook to urge Anchor to assume the collective bargaining agreement prior to the sale.

On January 6, 1989, the Union filed a grievance with Owens as a result of the alleged losses incurred by the employees upon the sale of the Glassboro facility to Anchor. The grievance was denied and, in May of 1989, Owens and the Union agreed to submit the matter to arbitration where both parties would frame the issues for the arbitrator. *See* Plaintiff's Exhibits 10 & 11 in Support of Their Motion to Enforce the Arbitration Award.

Several provisions of the Owens-Union collective bargaining agreement form the basis of the dispute. The most pertinent provisions include the following:

ARTICLE 1

Duration

Section 1. This contract shall become effective April 1, 1986, and shall continue in effect through March 31, 1989, and as long thereafter as regular negotiations for the making of a new Contract are in progress.

. . . .

Section 3. No changes may be made in this Contract unless mutually approved by the Company, the International Officers of the Glass, Pottery, Plastics & Allied Workers and representatives of the Local involved.

. . . .

ARTICLE 9

Artibitration

Section 1. All disputes not settled pursuant to the procedure set forth in Article 8, Grievance Procedure, may be referred to arbitration by a notice given to the Company or the Union by the other within ten days after the conclusion of Step 3 of the grievance procedure. Such notice shall be in writing, setting forth the matter in dispute and the relief requested.

. . . .

Section 5. The arbitrator shall have no power to add to, subtract from, or modify the terms of this Contract or to set standards of production. The arbitrator's decisons shall be final and binding upon both parties.

. . . .

ARTICLE 19

Retirement Income

Section 17. Effective 4/1/83, when the Company elects to close a plant permanently, an employee under age 60 whose employment is terminated as a result of such closing on or after 4/1/83, may retire and receive a pension benefit figured as if he were age 60 based on his years and months of credited service at the date of such closing, provided he has thirty (30) or more full years of credited service at the date of such closing.

. . . .

ARTICLE 31

Severance Pay

If the Company elects to permanently close the Glassboro Plant or a department, severance shall be paid on the basis of 25 hours per credited year of service with a maximum of 750 hours payable.

. . . .

ARTICLE 33

Successors, Transferees and Assignees

This contract shall be binding upon the parties hereto, their successors, transferees and assignees. In the event the Company sells or transfers this plant, this agreement shall remain in full force and effect and be binding upon the purchaser or transferee.

B. The Arbitrator's Opinion

As previously agreed, both parties submitted a statement of the issues for the arbitrator. Essentially, three issues were presented concerning liability: (1) whether Owens violated Article 33 of the collective bargaining agreement by failing to condition the sale of

the plant on the assumption by Anchor of the collective bargaining agreement; (2) whether Owens violated Article 31 of the collective bargaining agreement by not making severance payments to its former employees; and (3) whether Owens violated Article 19, Section 17 of the collective bargaining agreement by failing to implement the pension benefit provisions applicable to the class of employees defined in that provision.[3]

(1) Article 33—The Successorship Clause

The arbitrator, Rolf Valtin, first addressed the issue concerning the Article 33 successorship clause. He summarized the five arguments put forward by Owens, which can be further summarized: (1) the language of Article 33 does not provide for an active duty to be performed by Owens; rather, it is a passive successorship clause which frees Owens of liability if the purchaser does not assume its obligation to be bound by the collective bargaining agreement; (2) the parties did not intend for Owens to be liable in this instance since, in prior negotiations between Owens and the Union, the Union proposed and Owens rejected, a more extensive successorship clause which expressly obligated Owens to require any proposed purchaser to assume the terms of the collective bargaining agreement; (3) the parties did not intend for Owens to be liable in this instance since, in subsequent negotiations between the Union and Owens covering other facilities, the Union proposed, and Owens accepted, the following addition to the successorship clause which was previously identical to Article 33: "and the Company agrees it will include in the purchase agreement that this Contract is binding on

[3] As discussed *infra*, the Union provided six issues to the arbitrator. In addition to the three issues paraphrased above, the Union added the following after each issue: "If so, what is the proper remedy?"

the purchaser or transferee;" (4) Owens' position is in accordance with the "successorship doctrine," which holds that the purchaser of a bona fide sale of an employing company may only be obligated to bargain with a prior union, but does not require that the new employer be bound by the previous labor agreement; and (5) the Union should be estopped from seeking to hold Owens liable since it did not assert its rights against Anchor. *See, Owens-Illinois, Inc.,* at 8-12 (unreported) (Valtin, Arb.) [hereinafter "Arb. Op."] Plaintiff's Exhibit 1 in Support of Their Motion to Enforce the Arbitration Award.

Arbitrator Valtin rejected each of these arguments. He initially observed that "there simply cannot be any question that Article 33 was breached." Arb. Op. at 12. He reasoned that the duration was a term of the contract and that, when Owens treated the contract as no longer binding with the arrival of the successor, three months short of its duration, they clearly breached the first sentence of Article 33 which states that "[t]his contract shall be binding upon the parties hereto, [and] their successors . . . ." *Id.* He found that the second sentence of Article 33 was "more particularized" than the first sentence, since it presupposed the sale or transfer of the plant and required that the agreement remain in full force and effect and be binding on the purchaser or transferee. Since there was a sale of the plant three months prior to the agreement's duration and the purchaser was not bound by the agreement, a "clearer disregard of a clear commitment is difficult to imagine." *Id.* at 13. He stated that the commitment of Article 33 must be viewed as a commitment by Owens to the Union, since the parties to the agreement were the two signatories to the agreement and no others. Moreover, the commitment was in no way conditional on finding a purchaser who would assume the agreement.

The arbitrator also stressed that this was not a case where the assumption or non-assumption of the collective bargaining agreement was overlooked in the negotiating process, nor was it one in which the purchaser gave an understanding that the agreement would be kept in effect and then abandoned it. Rather, the negotiators all had copies of the collective bargaining agreement and were aware of Article 33 and acted in plain defiance of that provision. Because Owens was a partner in the adoption of Section 13(b) of the Agreement, Arbitrator Valtin rejected Owens' passive/active theory as "not even deserving of a sympathetic ear on the circumstances of the present case." *Id.* at 14.

Moreover, the arbitrator did not view the federal successorship doctrine as a matter of concern in this case since Article 33 does not state that the purchaser is to recognize the Union and engage in bargaining for a new agreement. "[A]s to the commitment which *is* made under Article 33," he added, "there is no contention that it is to be discarded, or otherwise to be treated as unenforceable, for lack of validity under the law." *Id.* (emphasis in original).

As to Owens' contentions regarding prior and subsequent negotiations with the Union for the Glassboro and other plants, the arbitrator held that the additional language was, essentially, superfluous; it merely implemented what was already required under the provision as written.

The arbitrator rejected Owens' estoppel argument as burden-switching. He questioned whether the Union could have done anything differently. They clearly could not have been a rightful participant in the negotiations leading to the Agreement. After the consummation of

the Agreement, although the Union could have insisted—presumably by striking—on the resurrection of the Owens-Union collective bargaining agreement, this course of action should not be a condition of arbitrating the fulfillment of Owens' promise under Article 33.

Having concluded that Owens breached Article 33 of the collective bargaining agreement, the arbitrator next addressed the remedy. He held that, although the "technically correct" answer is to undo what has wrongfully taken place, "this would mean voiding the sale as an improper act under Article 33, the retroactive application of the [Owens-Union agreement] through its expiration date with whatever make-whole consequences might be involved, and the retroactive negotiation of a new [Owens-Union agreement], with the former . . . agreement as the base from which the parties would have negotiated for the new Agreement, with whatever make-whole consequences this would entail." *Id.* at 18. However, in view of the enormous difficulties this would involve, likely throwing the parties into protracted litigation, and because neither party has asked for this remedy, Arbitrator Valtin treated the severance and retirement income issues as linked with the remedy under Article 33. *Id.* at 19. He noted that those two issues could not have arisen if the collective bargaining agreement had remained in effect and, accordingly, proceeded with the severance issue.

(2) Article 31—Severance Payments

The next key issue was whether Owens "permanently close[d]" the Glassboro plant, triggering the severance payment formula set forth in Article 31. The purpose of severance pay, the arbitrator observed, is to cushion the impact for employees who have been

dismissed without expectation of returning to work. Another purpose, he surmised, was that it may be viewed as a reward for past service in the face of loss of employment. *Id.* at 22. However, "[h]ere, both the plant and its operations stayed intact and there was no cessation—indeed, not even an interruption—in employment. And if it is granted—as it must—that the plant was not permanently closed within the usual meaning of the term, it must also be granted (in the absence of evidence respecting the negotiating discussions) that the plant was not permanently closed as the parties intended the term to be applied when they adopted Article 31." *Id.*

Nonetheless, he determined that the severance pay called for in Article 31 is properly applied in rectification of the violation of Article 33. He reasoned that

> in overall impact, the loss was severe and involved hardships which are not dissimilar to the hardships which Article 31 is designed to cushion. Rather than remain in employment with every Agreement right kept intact, the employees: were permanently dismissed from [Owens] employment, had no right to be employed by Anchor, went to work under Anchor's unilaterally established terms, and ended up (judging by what evidence there is respecting the new Anchor-[Union] Agreement) faring substantially worse than they would have fared had their rights under Article 33 been observed.

Id. at 23-24.[4]

[4] The Union submitted tabulations to the arbitrator of the amount of severance payments due to the employees. The average per-employee payment came to approximately $5,500, and the sum for the workforce as a whole came to approximately $2 million. *Id.* at 24.

(3) Article 19 Section 17—Special Pension Benefits

Finally, the arbitrator summarily granted the special pension benefits called for in Article 19, Section 17. He found that the issue involved only a handful of employees,[5] and that the triggering language ("when the Company elects to close a plant permanently") was of the same import as the language used in Article 31. Accordingly, he granted the benefits for the same reasons given in the previous issue.

C. The Parties' Contentions

From their voluminous submissions to the Court, we can briefly summarize the parties' respective positions. In essence, the Union maintains that Owens cannot satisfy the strong showing required to vacate an arbitration award. Arbitrator's awards are entitled to great deference and may not be vacated merely because the court disagrees with the arbitrator's factual or legal interpretations. Here, the arbitrator's analysis was not only rational, it was correct. Additionally, arbitrators are give [sic] wide latitude to fashion a remedy and, accordingly, the remedy imposed by Arbitrator Valtin must be enforced.

Owens maintains, in essence, that the arbitrator's award constituted a rewriting of the parties' labor agreement in plain violation of the express restriction in Article 9 of the agreement which states that "[t]he arbitrator shall have no power to add to, subtract from, or modify the terms of this contract . . . ." They seize upon the arbitrator's finding that "the plant was not

[5] It appears that eight employees met the eligibility requirements of Article 19.

permanently closed as the parties intended the term to be applied," and argue that, rather than simply misinterpreting the contract, the arbitrator improperly modified the contract. Additionally, the same can be said for the arbitrator's finding that Owens had an affirmative obligation to condition the sale on the purchaser assuming the collective bargaining agreement. Finally, Owens maintains that, even if they are liable under the agreement, the arbitrator (1) prematurely reached the remedy issue, and (2) did not have support in the record to award the $2 million remedy.

II. DISCUSSION

A. Summary Judgment Standard

The standard for granting summary judgment pursuant to Federal Rule of Civil Procedure 56 is a stringent one. Summary judgment is appropriate only if all the probative materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g., Hersh v. Allen Products Co.,* 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.,* 721 F.2d 118, 119 (3d Cir. 1983). In determining whether there remain any genuine issues of material fact, the court must resolve all reasonable doubt in favor of the nonmoving party. *Meyer v. Riegel Products Corp.,* 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. dismd.,* 465 U.S. 1091 (1984); *Smith v. Pittsburgh Gage & Supply Co.,* 464 F.2d 870, 874 (3d Cir. 1972). Significantly, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

Under this standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (emphasis in original). Indeed, where the moving party has made a properly supported motion for summary judgment, it is incumbent upon the nonmoving party to come forward with specific facts to show that there is a genuine issue of material fact for trial. *Id.* 477 U.S. at 248. Thus, once the moving party has carried its burden of establishing the absence of genuine issues of material fact, the nonmoving party "may not rest upon mere allegations or denials" of its pleading, Fed. R. Civ. P. 56(e), but must produce sufficient evidence to reasonably support a jury verdict in its favor. *Id.*, 477 U.S. at 249; *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring), and not just "some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

B. The Arbitral Award

In the *Steelworkers trilogy*, the Supreme Court made clear that courts play an extremely limited role when asked to review the decision of an arbitrator. *See, United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *see also, United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). Indeed, courts may not review the merits of an award even where there have

been serious errors of fact or misinterpretation of the contract. *Misco,* 484 U.S. at 36. Otherwise, the federal policy of settling labor disputes would be undermined if courts had the final say on the merits of awards. *Id.* (citing *Enterprise Wheel,* 363 U.S. at 596). The test is whether "the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice.'" *Id.* (quoting *Enterprise Wheel,* 363 U.S. at 597). This test has been strictly applied in this Circuit. It has been observed that "federal labor law elevates labor arbitrators to 'an exalted status.'" *News America Publications, Inc., Daily Racing Form Div. v. Newark Typographical Union, Local 103,* 918 F.2d 21, 24 (3d Cir. 1990) (quoting *Ludwig Honold, Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1126 (3d Cir. 1969)). Just recently, in *News America,* Judge Higginbotham emphasized the courts' limited, indeed "undemanding" role:

> As long as the arbitrator has *arguably* construed or applied the contract, the award must be enforced, regardless of the fact that a court is convinced that [the] arbitrator has committed a serious error. . . . This Court has held that there must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of the award. . . . Thus, only where there is a 'manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.'
>
> In this regard, a court may not review the merits of the arbitral decision. . . . A court does not review the award to ascertain whether the arbitrator has applied the correct principles of law. . . . An arbitral award may not be overturned for factual error, . . . or because the court disagrees with the arbitrator's assessment of the credibility of

> witnesses, or the weight the arbitrator has given to testimony. . . . It should be clear that the test used to probe the validity of a labor arbitrator's decision is a singularly undemanding one.

Id. (citations omitted; emphasis in original).

It must be borne in mind, however, that an arbitrator's authority to settle disputes under a collective bargaining agreement is contractual in nature, and is limited to the powers that the agreement confers. *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990). The arbitrator "may not shield an 'outlandish disposition of a grievance' from judicial review 'simply by making the right noises—noises of contract interpretation.' " *Id.* (quoting *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986)). Thus, where the court determines that the arbitrator violated the terms of the agreement, the court should not enforce the award. *See, e.g., Pennsylvania Power Co. v. Local Union No. 272 of International Brotherhood of Electrical Workers*, 886 F.2d 46, 49-50 (3d Cir. 1989) (arbitrator's determination that grievance concerning evaluation and compensation for newly created position was arbitrable was based on the general desirability of arbitration and a syllogistic interpretation of the terms of the labor agreement and, thus, exceeded the scope of his authority); *see also, United Food & Commercial Workers Union, Local 1119 v. United Markets, Inc.*, 784 F.2d 1413, 1415 (9th Cir. 1986).

Owens maintains that the arbitrator exceeded his authority by reading an affirmative obligation to secure Anchor's assumption of the labor agreement into Article 33, where none existed. Whether or not this is so depends on how one views Owens' contractual obligation. Owens, by virtue of Article 33, made an obligation that

the collective bargaining agreement, in its entirety, would "be binding upon the parties hereto, their successors, transferees and assigns." Owens, in effect, repudiated the contract three months prior to its mutually agreed upon duration. This was a clear breach of Article 1, Sections 1 and 3 (duration) as well as Article 33. Stating that Owens had an affirmative obligation to secure the purchaser's assumption of the agreement may be viewed as simply another way of recognizing that Owens would be liable to the Union if the purchaser did not assume the agreement. Moreover, the arbitrator correctly observed that Owens and the Union were the only signatories to the contract. Thus, they could not purport to impose liability on a non-signatory third party. *Cf. Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 258 n.3 (1974) (mere existence of successorship clause cannot bind successor to substantive terms of predecessor's collective bargaining agreement). Accordingly, the provision in Article 33 that

> [i]n the event the Company sells or transfers this plant, this agreement shall remain in full force and effect and be binding upon the purchaser or transferee

must be read as an obligation by Owens to the Union. When Owens sold the plant to Anchor and expressly agreed that the purchaser would not be bound by the collective bargaining agreement, it breached this obligation to the Union, and the Union was damaged thereby. Consequently, the arbitrator's conclusion that Owens had an affirmative obligation to secure the assumption by the purchaser, is grounded in sound principles of contract construction. *But see, Central States, Southeast and Southwest Areas Pension Fund v. PYA/Monarch of Texas, Inc.*, 851 F.2d 780, 783 (5th Cir.

1988) (predecessor employer not obligated to continue contributions to pension fund on theory that successorship clause obligated employer to ensure that successor employer would adopt predecessor's collective bargaining agreement; court distinguished arbitration opinions which held to the contrary).

The flaw in Owens' argument is that almost every interpretation of a contractual provision which does not comport with another's interpretation of the same provision may be viewed by the latter as an addition to or modification of the contract. It is a leap in logic which is at once easy to make and, potentially threatening to the policies underlying federal labor law. While there are rare instances where an arbitrator may attempt to impose his brand of industrial justice by adding to or modifying a contract, the instant case is simply not one of them.

Owens contends that the arbitrator's award should be vacated since a requirement that a purchaser assume the collective bargaining agreement would violate public policy as embodied in the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151 *et seq.* (West 1973 & Supp. 1990). Owens notes that an employer is prohibited by section 8(a)(2) of the NLRA from recognizing or bargaining with a minority union. 29 U.S.C. §158. The public policy set forth in the NLRA "represents well defined and dominant public policy." *Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters, Local Union 70,* 913 F.2d 736, 742 (9th Cir. 1990). In this case, had Anchor decided not to hire a majority of its workforce from the bargaining unit, (which it had the right to do, *see NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972)), it would have violated federal labor law by recognizing a minority union. Rather, Anchor's duty to bargain with the Union, under federal law, did not arise until it hired a majority

of its workforce from the former bargaining unit. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Courts will refuse to enforce an arbitrator's award that violates the law or public policy. *Id.*, 913 F.2d at 743; *George Day Construction Co. v. United Brotherhood of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1477 (9th Cir. 1984).

Owens' contention is without merit. First, the argument is merely hypothetical in this case since Anchor *did* hire a majority of its workforce and could have contractually obligated itself, perhaps conditioned on NLRA requirements, to assume the prior collective bargaining agreement. *See, generally*, R. Gorman, *Labor Law* 125 (1976) ("successor employer may, of course, assume obligations greater than those required by law and may, for example, expressly agree to abide by the predecessor's contract if the union is willing"). More important, however, is the fact that the Union does not seek specific performance from Anchor. Rather, it is seeking contractual damages from Owens for breach of the successorship clause by Owens' failure to bind Anchor to the collective bargaining agreement. In *Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990), the Association of Flight Attendants ("AFA"), which represented the flight attendants of Western Airlines, Inc., sought damages against Delta Airlines, Inc. for Western's breach of a successorship clause (similar to the clause in this case)[6] when Western

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[6] The clause in that case stated:

> This agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the Railway Labor Act, as amended.

879 F.2d at 907.

was acquired by Delta and failed to bind Delta to the Western-AFA collective bargaining agreement.[7] In considering whether the claim was arbitrable, the D.C. Circuit stated: "That AFA no longer has the right to specific enforcement of the successorship clause, however, simply does not answer the question whether Delta is answerable in damages for Western's alleged pre-merger breach of that clause." *Id.* at 910. The court held that an arbitrator could reasonably find that Western was obligated by the successorship clause to bind any merger partner to the collective bargaining agreement. *Id. See also, Howard Johnson,* 417 U.S. at 257-58 (where successor did not assume terms of predecessor's collective bargaining agreement and predecessor agreed to arbitrate with union, "presumably this arbitration will explore the question whether the [predecessor] breached the successorship provisions of their collective-bargaining agreement, and what the remedy for this breach might be") (footnote omitted). Accordingly, because we hold that the arbitrator's ruling did not violate public policy, the award can not be vacated on those grounds.

These cases also answer Owens' contention that the Union should have first arbitrated the dispute with Anchor. Because Anchor hired every Glassboro employee, the Union could have compelled Anchor, under the *Wiley* successorship doctrine, to arbitrate its obligations under the successorship clause. *See John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964). We agree with the arbitrator's characterization of this argument as burden-switching. Under *Wiley* and *Burns,* although Anchor had an obligation to recognize and bargain with the Union upon the Union comprising a majority of its own workforce, Anchor, as successor,

[7] Western sought a court order compelling arbitration on the damages issue.

could not be required to assume Owen's labor contract. *See, generally, Burns, supra;* R. Gorman, *Labor Law* 116-25 (1976). The Union remained free to assert its rights under the contract that it had with Owens.

Owens also maintains that, even if it is liable under Article 33, the award of severance pay under Article 31[8] was clearly a modification of the collective bargaining agreement in light of the arbitrator's explicit finding that "the plant was not permanently closed as the parties intended the term to be applied. . . ." Arb. Op., at 22. As discussed above, the distinction between an "interpretation" and an "addition" to or "modification" of a contract is easily blurred. Here, the arbitrator's discussion immediately following the above-quoted language indicates his finding that the loss to the employees as a result of Owens' breach of Article 33 was not dissimilar to the type of hardships the parties intended the severance payments to cushion, even though the language used in Article 31 did not seem to cover this situation. Thus, there was a "plant closing" within the contemplation of the parties.[9] Although the arbitrator's opinion appears to indicate that the Article 31 remedy was solely as a result of the Article 33 breach, the opinion can also be read as his finding that the sale

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[8] The foregoing discussion applies to the arbitrator's award of retirement benefits under Article 19 as well as for the severance award.

[9] This conclusion is consistent with other decisions which have compelled severance payment upon the sale of assets even where the employees continued to work for the purchaser and, especially where, as here, the purchaser does not provide severance benefits. *See Arco Metals Co.*, 88 Lab. Arb. 1209 (Berkowitz, Arb. 1987); *see generally,* E. Hennesay, *Welfare Plans in Corporate Mergers and Acquisitions,* §IV.D. (P.L.I. 1989).

of the plant triggered the language in Article 31.[10] Indeed the arbitrator's opinion is ambiguous, and it is possible that he was merely imposing "his own brand of industrial justice." There is adequate support in the opinion, however, to conclude that the award draws its essence from the collective bargaining agreement. It is well settled that ambiguity in an arbitrator's opinion is not grounds to vacate the award. "Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *Enterprise Wheel*, 363 U.S. at 598 (footnote omitted). *See also, Newark Morning Ledger Co. v. Newark Typographical Union Local 103*, 797 F.2d 162, 168 (3d Cir. 1986) (Mannsman, J., dissenting).

Moreover, our conclusion is consistent with the Third Circuit's holding in *News America*. In that case, the arbitrator interpreted a provision of a collective bargaining agreement which provided that, in the event

[10] The arbitrator's summary disposition of the third issue (the Article 19 pension benefits issue) supports this conclusion. The arbitrator concluded that the triggering language of Article 19 was of the same import as the triggering language of Article 31, therefore, the same conclusion was mandated (*i.e.*, that the sale of the plant triggered the benefits and constituted a "plant closing" as the parties intended that provision to apply). Arb. Op. at 25.

Moreover, to the extent the arbitrator may have awarded the Article 31 benefits solely as a remedy for the Article 33 breach, we hold that the award would still draw its essence from the collective bargaining agreement. As noted above, this court's agreement with the arbitrator's factual or legal conclusions is simply irrelevant to our limited scope of review.

the company and the union are unable to reach agreement on wage adjustments, the following formula would apply:

> [t]he equivalent of any economic package granted by the DAILY RACING FORM to New York Mailers Union No. 6 or Newark Newspaper Printing Pressman's Union No. 8 (whichever is greater) during the twelve months prior to November 1 of any year will be automatically granted to Newark Typographical Union members effective on November 1.

News America, 918 F.2d at 22. The arbitrator found that this provision was intended to maintain the economic status of the defendant union with the Mailers and Pressman unions. Accordingly, because those unions had negotiated accelerations in their wage increases, the arbitrator accelerated defendants' wage increase by three months. In an action to vacate the award, the district court held that the term "effective November 1" cannot plausibly mean August 1, and concluded that it should not enforce an award that ignored the clear language of the contract. *Id.* at 23. The Third Circuit reversed, stressing that "the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Id.* at 25 (quoting *Misco*, 484 U.S. at 38). Arbitrator Valtin did no more in the present case by finding that Article 31 was triggered by the sale to Anchor. The arbitrator's interpretation draws its essence from the collective bargaining agreement and must be enforced.

Even assuming that Owens is liable to the Union under the collective bargaining agreement, Owens contends that Arbitrator Valtin exceeded the scope of his authority since the parties allegedly did not submit the

remedy issue to him and, moreover, there was insufficient evidence in the record to support the remedy that he ultimately imposed. In support of this contention, Owens has submitted the affidavits of Messrs. John D. Frechette, Owens' Vice President of Labor Relations and Arthur E. Grills, Owens' Manager of Group Insurance, who both assert that, when the Union offered an exhibit showing the losses incurred as a result of the changes in fringe benefits made by Anchor, Owens and the Union "discussed the remedy issue and they agreed that if liability was found by the Arbitrator the parties themselves would attempt to resolve the appropriate remedy while the Arbitrator retained jurisdiction to decide the remedy if the parties were unable to agree." Affidavit of John D. Frechette, at ¶9; affidavit of Arthur E. Grills, at ¶9. Moreover, the Union specifically requested in their post arbitration brief and reply brief that the arbitrator retain jurisdiction while the parties sought to resolve the remedy. Defendant's Exhibits A & B in Support of Their Crossmotion to Vacate the Arbitration Award.

However, the record before us does not indicate that either party ever notified the arbitrator of any restrictions on his remedial authority. Although the affidavits submitted by Owens suggest that the parties themselves may have made such an agreement, there is no basis upon which we can conclude that the arbitrator exceeded the scope of his authority. The Union specifically raised the remedy issue in its issue statement. *See* note 3, *supra.* Although arbitrators may not impose a remedy which directly contradicts the express language of the collective bargaining agreement, *see, Leed Architectural,* 916 F.2d at 65, so long as the remedy draws its essence from the collective bargaining

agreement, arbitrators have broad discretion in establishing the scope of the issue before them and in formulating remedies. As the Supreme Court noted in *Enterprise Wheel,*

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.* There the need is for flexibility in meeting a wide variety of situations.

363 U.S. at 597 (emphasis added). In this case, once the arbitrator concluded that the severance and retirement payments were warranted, the damages were determined by reference to a specific formula and no additional evidentiary hearing was necessary. Having concluded that the arbitrator did not exceed the scope of his contractual authority, our inquiry must end and his remedy must be enforced.

Owens vehemently contends that any damages to the Union beyond the approximately $32,000 in lost fringe benefits is pure speculation. They maintain that even if the company had required Anchor to accept the collective bargaining agreement, the agreement would have expired by its own terms and thus there was absolutely no evidence that the Union would have ended up in any better position had Anchor initially assumed the previous agreement. It is precisely for this reason, however, that Owens would have been wise to either wait three months before selling the plant or, alternatively, to negotiate for Anchor to assume the agreement for the brief period remainng. Simply put, their argument would have had more force on the negotiating table then it is in this forum. No doubt, the parties had their own reasons for consummating the sale at the time and in the manner

in which they did. However, Owens' argument is completely undermined when the severance payments are viewed as having been awarded by its own terms, in accordance with in Article 31, rather than as an approximation of damages for the breach of Article 33. As discussed above, this conclusion has adequate support in the arbitrator's opinion. This being the case, the severance payments are calculated from the precise formula found in the collective bargaining agreement and there becomes no basis on which to conclude that this award does not draw its essence from that agreement.

C. Prejudgment Interest, Costs and Attorneys Fees

Finally, the Union seeks prejudgment interest, costs and attorneys' fees. District courts have broad discretion in determining whether to allow prejudgment interest in claims arising under federal labor law. *See Ambromovage v. United Mine Workers,* 726 F.2d 972, 982 (3d Cir. 1984). The general rule is that prejudgment interest is awardable when the damages from breach of contract are ascertainable with mathematical precision. *Eazor Express, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951, 973 (3d Cir. 1975), *cert. denied,* 424 U.S. 935 (1976); *see also, Feather v. United Mine Workers,* 711 F.2d 530, 540 (3d Cir. 1983). Since the severance and retirement payments constitutes a liquidated amount, prejudgment interest is appropriate in this case.

We decline to award attorneys' fees, however, since Owens has not litigated in bad faith, vexatiously, or for oppressive reasons. *See, Mobil Oil Corp. v. Independent Oil Workers Union,* 679 F.2d 299, 305 (3d Cir. 1982). In the absence of such bad faith, under the American rule, each party bears the burden of its own legal expenses. *Id.* Especially in light of the ambiguity of the

arbitrator's opinion in this case, Owens has presented a good faith challenge to the award and has done so promptly.

III. CONCLUSION

For the aforementioned reasons, we hold that the arbitrator's opinion and award draws its essence from the Owens-Union collective bargaining agreement with respect to both liability and remedy imposed. Accordingly, plaintiff's motion to enforce the arbitration award will be GRANTED, and defendant's motion to vacate the arbitration award will be DENIED. Each party shall be responsible for its own costs, except that defendant shall be responsible for prejudgment interest from the date of the arbitration award.

An appropriate Order will be filed this day.

/s/ JOHN F. GERRY
Chief Judge
United States District Court

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 4, 1991)

Civ. Nos. 90-3236, 3291 (MHC)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GLASS, MOLDERS, POTTERY, PLASTICS and ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO and LOCAL UNION NO. 4,
Plaintiffs,

v.

OWENS-ILLINOIS, INC.,
Defendant.

and

OWENS-ILLINOIS, INC.,
Plaintiff,

v.

GLASS, MOLDERS, POTTERY, PLASTICS and ALLIED WORKERS, INTERNATIONAL UNION, AFL-CIO,
Defendant.

ORDER

This matter having come before the Court on motions by plaintiffs for summary judgment to enforce an arbitration award and for prejudgment interest, costs

and reasonable attorneys fees and a cross-motion by defendant, Owens-Illinois, Inc., for summary judgment to vacate the arbitration award; and

For the reasons set forth in the Court's opinion filed this day; and

For good cause shown;

It is on this 1st day of February, 1991 ORDERED that plaintiffs' motion is hereby GRANTED and defendant's, Owens-Illinois, Inc., motion is hereby DENIED.

/s/ John F. Gerry
Chief Judge
United States District Court

DECISION AND AWARD OF ARBITRATOR

(Dated July 3, 1990)

Grievance No. 4-89-4

Glassboro Closure Plant

In the Matter of Arbitration

Between:

Owens-Illinois, Inc.
and
Glass, Molders, Pottery, Plastics and
Allied Workers International Union,
AFL-CIO Local Union No. 4

Here to be determined are three issues which arose from the sale of the Glassboro Closure Plant by the Company to Anchor Hocking Corporation in early January 1989. The sale was consummated at a time when the collective-bargaining Agreement covering the plant's hourly employees had about three months to run. It was the 3-year Agreement between the parties (O-I and GMP) which became effective on April 1, 1986, and which carried an expiration date of March 31, 1989. By both parties' positions, this Agreement is to be applied in determining the present dispute.

The case took two days to hear; there are numerous exhibits; both parties submitted post-hearing and reply briefs of substantial length and admirable thoroughness; and scores of arbitration and court decisions have been cited (either directly or by way of what is contained in one or another of the directly-submitted decisions). I

have studied the record with care but do not believe that any good purpose would be served by providing a full review of it. To the contrary, my objective will be to proceed in distilled fashion. The essence of what is posed for decision will be shown as the issues are successively dealt with.

The facts of the case are not substantially in dispute. The following is the framework:

—O-I and GMP had entered into a series of collective-bargaining Agreements covering the Glassboro Closure Plant for some twenty-five years.

—In mid-November, 1988, the Company entered into an Asset Purchase Agreement with Anchor Hocking Corporation (hereafter referred to as simply "Anchor"). The proposed purchase was conditioned upon federal-regulatory approval, obtained a few weeks later. The purchase price was about $36 million.

—GMP's International President was made aware of the probable sale by O-I's Vice President for Labor Relations in November and of the fact that approval had been obtained, and that finalization was in the making, in December.

—GMP's International Representative for the plant was made aware of the probable sale by the Plant Manager in mid-November; he visited the plant in late-November and had discussions about the probable sale with the plant's Personnel Manager; and he learned by telephone on January 3 both that the transaction would be finalized on January 5 and that Anchor would not assume the collective-bargaining Agreement.

—The International Representative therewith called his International Vice President and was told: 1) that a majority of the plant's employees would have to be hired by Anchor if GMP was to be recognized as the bargaining agent, and 2) that he should see to it that the greatest possible number of the employees show up for work on January 5.

—As the Company stresses, there is no evidence that anyone on GMP's side ever undertook to urge Anchor to view the assumption of the collective-bargaining Agreement as an obligatory part of the purchase of the plant. GMP treated Anchor, the Company is saying, as if Anchor played no role in not assuming the Agreement.

—There was a 100-percent turnout by the plant's employees on January 5. And, though as new employees, all of them were hired by Anchor. In this sense, as the plant operated as an O-I plant through January 4, there was no loss of work by any of the plant's employees. Moreover, in becoming Anchor employees, they retained the Agreement's wage rates.

—Though it maintained the wage rates, Anchor neither assumed the Agreement nor applied all of its terms. To the contrary, in an announcement to the employees on January 5, Anchor explicitly showed that it was not assuming the Agreement and explicitly identified the contractual areas in which the Agreement terms were being eliminated. The following are excerpts from the announcement and from the attachment to which it refers. They are quoted to demonstrate that the case cannot possibly be treated as involving either full or substantial continuity of contractual benefits. The announcement itself had this:

"As your prospective employer, we offer employment to each and every one of you in accordance with this notice and the attached summary of changes. While we have chosen not to adopt the collective bargaining agreements between Owens-Illinois and the Glass, Molders, Pottery, Plastics & Allied Workers International Union, we will apply the working conditions set forth in those agreements (the Union-Shop Contract and the Local Union-Management Agreement) as modified by the changes described in detail in the attachment. Please read the attachment carefully. We would like you to note that all current wage rates are being continued and, other than slightly increased insurance premium contributions, no significant changes are being made in your basic fringe benefits.

You may indicate your acceptance of the Company's offer of employment by continuing to report for work in accordance with your previously established schedule. Within the next few days, after we have hired a substantial and representative complement of employees, we will be able to determine whether the law permits us to recognize and bargain with the union. As soon as the law allows, we intend to commence negotiations with the union over the terms of an initial labor agreement. Naturally, during those negotiations, all terms and conditions of employment will be subject to bargaining."

The attachment included the following:

"*Side Agreements, Letters and Practices*—Are not binding on the Company.

* * * *

Layoff Notice—All requirements of advance notice for layoff, including but not limited to those set forth in Article 3 of Owens-Illinois' Union Shop Contract, are eliminated.

* * * *

Subcontracting—All restrictions against the Company's management right to sub-contract, including but not limited to any restriction set forth in Article 30 of Owens-Illinois' Union Shop Contract, are eliminated.

Article 28 of Owens-Illinois' Union Shop Contract—All transfer, notice and other rights set forth in this Article are eliminated.

Special Call Assignments—Any and all restrictions against the work that may be performed by employees summoned to work under a special call . . . are eliminated.

Filling of Vacancies—Any and all restrictions against the Company's mangement rights to fill vacancies . . . are eliminated.

* * * *

Successors, Transferrees and Assignees—All restrictions against the Company's management rights to sell or transfer the plant, including but not limited to those set forth in Article 33 of Owens-Illinois' Union Shop Contract, are eliminated.

Cost of Living Allowances—including but not limited to all terms and conditions set forth in Article 38 of Owens-Illinois' Union Shop Contract, are eliminated.

Personal Days Off—Are eliminated.

* * * *

Severance Pay—All rights to severance pay, including but not limited to all rights set forth in Article 31 of Owens-Illinois' Union Shop Contract, are eliminated."

—Anchor in due course recognized GMP as the bargaining agent for the plant's employees, and these two parties therewith entered into negotiations for a new Agreement. The negotiations resulted in the adoption of a 3-year Agreement commencing on April 1, 1989.

—Several things are to be noted about the Asset Purchase Agreement between O-I and Anchor. One is that the Asset Purchase Agreement, quite in line with what in fact happened, clearly contemplated that the plant would continue to be operated. For example, though Anchor was not obligated to hire or otherwise offer employment to any of the plant's employees, O-I as obligated: 1) to encourage them to accept employment with Anchor, and 2) to refrain from hiring any of them for any of its own operations for 180 days. Another is that the Asset Purchase Agreement repeatedly makes reference to "Closing". I accept that this is a reference to the consummation of the Asset Purchase Agreement, not to the closing of the plant. Another is that the Asset Purchase Agreement was negotiated without representation by O-I's Labor Relations Department. The role of that Department was confined to providing the negotiators with a copy of the collective-bargaining Agreement—a role which it in fact fulfilled. And still another is that the Asset Purchase Agreement expressly granted Anchor the right not to assume the collective-bargaining Agreement. Specified at Section 13(b) was the following:

> "*Employee Agreements. Including Collective Bargaining Agreements.* It is understood and agreed that this Agreement does not obligate buyer to assume any of Seller's liablities or obligations under any collective bargaining agreement or other employment agreement, express or implied, relating to persons employed by Seller, and that, even if Buyer elects to assume Seller's rights and prospective obligations under any such collective bargaining agreement or other employment agreement, in no event will Buyer assume any liability or obligation arising out of any such collective bargaining agreement or other

> employment agreement relating to any transaction, event or activity occurring or condition or state of facts existing at or prior to the time of the Closing."

The following are the parties' respective issue statements. As can be seen, there are differences between them. And, as will be seen, the differences are reflective of what is being respectively contended as to each of the issues. There is no question, however, that there are three issues, each growing out of the sale of the plant and each concerned with the proper application of a particular Agreement provision. The affected Articles are Articles 33, 31 and 19.

The issue statement provided by the Company is this:

> "1. Did the Company violate Article 33 of the labor agreement when the Purchaser of the Glassboro plant did not continue all the terms of the labor agreement?
>
> 2. Did the Company violate Article 31 by not paying severance pay when the plant was sold to Anchor Hocking?
>
> 3. Did the Company violate Article 19, Section 17 by not implementing the special pension benefit provisions upon the sale of the plant?"

The issue statement provided by the Union is this:

"1. Did Owens-Illinois violate the parties' collective-bargaining agreement by its refusal to grant severance pay to Owens' former employees, when Owens, on or about January 5, 1989, terminated the employment of employees in its Glassboro, New Jersey plant and sold the plant to Anchor Hocking Packaging Co.?

2. If so, what is the proper remedy?

3. Did Owens violate its collective bargaining agreement with the Union, when it permanently closed its Glassboro plant as an Owens facility upon the sale of the facility to Anchor, and failed to permit employees under age 55, with 30 or more years of credited service to receive their full pensions, at the time of the closing, in accordance with Article 19, Section 17 of Owens' collective bargaining Agreement?

4. If so, what is the proper remedy?

5. Did Owens violate the contract between the parties, by failing to make the assumption of its collective bargaining agreement by the purchaser, a condition of the sale of Owens' Glassboro, New Jersey plant?

6. If so, what is the proper remedy?

I first deal with the issue which is concerned with Article 33 (Issue No. 1 under the Company's issue statement and Issue No. 5 under the Union's issue statement). The Article reads as follows:

> "*Successors, Transferees and Assignees*
>
> This Contract shall be binding upon the parties hereto, their successors, transferees and assignees. In the event the Company sells or transfers this plant, this agreement shall remain in full force and effect and be binding upon the purchaser or transferee."

The Company's position can be taken as granting that these declarations were not honored. The Company contends, however, that there was no breach of any obligations which *it* undertook under Article 33 and that the Company is therefore not to be held liable for any

Article 33 violation which may have occurred. I am holding both that the Article was violated and that the Company must be held accountable for the violation.

The Company's arguments may be summarized as follows.

1. The language of Article 33 contains nothing by way of an active duty to be performed by the Company in the event of the sale of the plant. The language neither says that the Company is to extract any sort of commitment from the purchaser nor says that a purchase agreement is to include any sort of clause involving the collective-bargaining Agreement. It is not to be denied that Article 33 purports to bind the purchaser to the collective-bargaining Agreement. But the Article is not one which requires the seller to undertake an affirmative act in this regard. Rather, the Article is properly read as a passive successorship clause which frees the Company of liability if the purchaser falls down on his obligation to be bound by the collective-bargaining Agreement. Cited are a number of arbitration decisions on the proposition that the seller, absent an express command on this score, is not required to obtain compliance of the purchaser's assumption duty under a successor clause. Though it relies on more (about to be shown), the Company thus submits that, alone by proper regard for the language of Article 33, the Union is erroneously asserting that the Company was obligated to see to it that Anchor would assume the collective-bargaining Agreement.

2. The 1986 negotiations covering the Glassboro plant support the argument concerning the passive nature of the language of Article 33. Proposed by the Union in those negotiations was the following "Successorship Clause":

"The Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event of the sale or lease by the company, or in the event the company is taken over or a portion of the company is taken over by sale, lease agreement, receivorship or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. The employer shall give notice of the existence of this Agreement to any purchaser, leasee, assignee, etc. Such notice shall be in writing with a copy to the union not later than 60 days prior to the effective date of sale. The employer shall advise the union of the willingness of the purchaser, leasee, assignee, etc. to adopt this Agreement, not later than 30 days prior to the effective date of sale.

Non-compliance with this provision is subject to the grievance procedure and/or may be pursued through litigation notwithstanding the lack of exhaustion of the grievance procedure. The remedy for such non-compliance shall include all damages and/or losses sustained as a result of such failure to give notice and/or such failure to require assumption of the terms of this Agreement."

This was language which not only specified active Company duties but which also expressly rendered the Company liable in the event of its failure to require assumption of the collective-bargaining Agreement. The proposal, however, was rejected; and Article 33 was re-adopted without change. The significance is obvious—and was respected in a cited arbitration decision involving comparable language and comparable unsuccessful efforts for changes in the language. Were the arbitrator, here, nonetheless to impose Company liability, he would exceed his authority under Article 9,

Section 5 ("The arbitrator shall have no power to add to, subtract from, or modify the terms of this Contract . . .").

3. Similarly revealing is what happened in the 1989 O-I-GMP negotiations covering the Plastic Products Plants. Until those negotiations, the successor language under the Plastics Products Agreement was identical to that contained in Article 33. The Union proposed, and the Company ultimately accepted, the following addition: "and the Company agrees it will include in the purchase agreement that this Contract is binding on the purchaser or transferee." The fact that the addition was sought obviously serves to show that the requirement did not exist under the former language. The Union is here proceeding as if the addition or its equivalence had been incorporated into Article 33 of the present Agreement. Instead, however, the arbitrator must apply the language which in fact is before him.

4. The Company's position is in tune with federal labor law on successorship. As formed by NLRB and court decisions, the successorship doctrine requires the purchaser to bargain with the employees' bargaining agent where a majority of the purchaser's workforce are employees who were in the seller's workforce—quite as the Union understood in urging that all the employees show up for work on the first day of the operation of the plant as an Anchor plant and quite as the required bargaining then took place. But the federal successorship doctrine seeks to preserve bargaining freedom and thus does not require the carryover of the seller's collective-bargaining Agreement.

5. The Union stayed on the sidelines and took no steps by which to enforce Article 33 against Anchor. There was no approach to Anchor by the Union in the

several weeks in which the Union knew about the upcoming sale; and, once the Anchor-GMP bargaining had begun there was no insistence by the Union that Anchor assume the O-I-GMP Agreement. In the light of this inaction, the Union should not be heard in its effort to impose liability on the Company.

Further, to the extent that the Union relies on Section 13(b) (quoted above) of the Asset Purchase Agreement as inconsistent with the requirement of Article 33, the Union is begging the question which is raised under Article 33—namely, whether the Company was obligated to compel Anchor to assume the collective-bargaining Agreement. For the given reasons, there was no such obligation on the Company. And, though Section 13(b) manifestly states that Anchor is not required to assume the collective-bargaining Agreement, the Section does not constitute either a statement which absolves Anchor from any responsibility it may have under Article 33 or a statement which provides Anchor with a defense against a Union claim that Anchor was obligated to assume the collective-bargaining Agreement.

Let it first be observed that I consider myself free to proceed without emcumbrance by the various court and arbitration decisions introduced by one party or the other. In bringing the decisions to my attention, the parties' lawyers have done what good lawyers do. And, indeed, I have been exposed to instructive material. But it is at once true: 1) that there is no uniformity in the treatment of the points which the parties are respectively seeking to establish; 2) that there is no case of the same underlying facts and Agreement language relative to the present case; and 3) that I am in any event not bound by anything held in any of the decisions. Various pieces of reasoning by others in other

cases may play an influential role. But it is in the end the particular arbitrator whom the parties have chosen who is to decide the particular case which they have submitted to him.

I am rejecting the Company's arguments for the following reasons.

First, there simply cannot be any question that Article 33 was breached. "This Contract" must obviously be read as a reference to all its terms, including its duration; it was to be binding on successors as well as the signatory parties; and it was treated as no longer binding with the arrival of the successor, about three months short of its duration. So much for the first sentence. The second sentence essentially echoes the first sentence but is more particularized. It specifically presupposes the selling or transferring of the plant, and it states that, where this happens, the Agreement "shall remain in full force and effect and be binding upon the purchaser or transferee". The selling of the plant is what here took place; the sale was consummated about three months prior the Agreement's expiration; Anchor was the purchaser; and the Agreement was not kept in full force and effect and not treated as binding on Anchor. A clearer disregard of a clear commitment is difficult to imagine.

Second, the parties to the Agreement were the two signatory parties—and no others. It must follow that the Article-33 commitment is to be viewed as a commitment by O-I to GMP—quite as in the case of seniority regulations, shift differentials, holidays and vacations, etc., etc. When the Company makes such commitments, it presumably expects to live up to them. It is an intention which does not bear saying—or, stated otherwise, it would be an off-repeated refrain if it required saying.

Granted that the Company, when it made the Article-33 commitment, did not know whether the plant would be sold and, if so, who the purchaser might be and what sort of demands he might make as requisite conditions for purchasing the plant. But the commitment laid down at Article 33 is not a conditional commitment—conditioned upon the making of a *satisfactory* sale or upon the finding of a purchaser who might be *pleased* or *readily willing* to assume the Agreement. It is a flat commitment, and it cannot be taken to lose its force as a sale materializes—or as a sale can be made to materialize only by acceding to a potential purchaser's demand for the shedding of the Agreement.

Third, while the just-given observations themselves add up to a rejection of the passive-versus-active distinction which the Company is urging, it is additionally to be appreciated that this is not a case in which the assumption or non-assumption of the collective-bargaining Agreement is overlooked in the negotiations for the sale of the plant or in which, indeed, the purchaser allows the negotiations to go forward on an understanding that the collective-bargaining Agreement will be kept in effect and then abandons it upon acquiring the plant. The very opposite is what here happened: a copy of the collective-bargaining Agreement was asked for and obtained by the negotiators for the sale of the plant, and it is obviously a fact (see the January 5 Anchor announcement and its attachment) that the negotiators were aware of Article 33. There is thus no escaping the conclusion that the negotiators, in adopting Section 13(b) of the Asset Purchase Agreement, acted in plain defiance of Article 33. Anchor was presumably the asking party as to Section 13(b). But O-I was a partner in its adoption. And O-I, to repeat, had

made the Article-33 commitment. I do not believe that the "passive" theory is in the first place correct under the language of Article 33. But I view it as not even deserving of a sympathetic ear on the circumstances of the present case.

Fourth, while I do not doubt the accuracy of the Company's statement respecting the successorship doctrine under federal labor law, I see no reason to hold concern for it in deciding the case. At issue is the proper interpretation and application of Article 33; Article 33 clearly does not say, and clearly cannot be construed as saying, that the purchaser is to recognize the Union and therewith engage in bargaining for a new Agreement; and, as to the commitment which *is* made under Article 33, there is no contention that it is to be discarded, or otherwise to be treated as unenforceable, for lack of validity under the law.

Fifth, because the asserted import is similar, I join the Company's arguments respecting the 1986 negotiations for the Glassboro Plant and the 1989 negotiations for the Plastic Products Plants. I am among the many arbitrators who: 1) have sided with the proposition that neither side ought to be permitted to gain in arbitration what it failed to gain in negotiations, or 2) have applied either an unsuccessful negotiating proposal or a negotiating proposal which resulted in additional or modified language as significant light-shedding in the proper interpretation of the language which was in effect at the time the proposal was made. Here, however, I reject the Company's reliance on these precepts as misplaced. As to the 1986 negotiations for the Glassboro Plant, the Union manifestly sought to go well beyond what had been secured under Article 33. In my opinion, the fact that the proposal for expanded

coverage included express provision for Company liability is not properly applied as foreclosing Company liability under the pre-existing and continued Article 33. So to apply the proposal would be to say that the clause as written did not contain the Company's responsibility for the keeping of its promise and thus did not call for Company liability. For the earlier-given reasons, I believe that the contrary is true. And as to the 1989 negotiations for the Plastic Products Plants, while the additional language does not expand upon the coverage of Article 33 and, instead, is a mere implementing requirement for the pre-existing coverage, I once more decline to give it the import which the Company is urging. It is significant that the additional language came into being on the heels of the sale of the Glassboro plant: the additional language, it is acknowledged, was the response to the Company's failure in that sale to require Anchor to assume the collective-bargaining Agreement. And while the Company contends that it thought long and hard before it assented to the additional language, I agree with the Union that the Company could not honorably have done less. Again going back to what has earlier been observed, the commitment of Article 33 was O-I's, and it was therefore for O-I to see to it that the sale of the plant would be conditioned on the purchaser's assumption of the collective-bargaining Agreement. The additional language which emerged from the Plastic Products negotiations is to this effect. It merely makes express what, to me, was embedded as a clear obligation.

Sixth, I dissent from the Company's argument respecting the Union's inaction toward Anchor in connection with Anchor's non-assumption of the Agreement. I see nothing in the language of Article 33, in reason, or in traditional notions under collective-

bargaining relationships, by which the enforcement role vis-a-vis Anchor can be taken to have been the Union's. One must wonder, indeed, what the Union is supposed to have done. The Union could clearly not have been a rightful participant, or even a rightful observer, in the negotiations leading to the Asset Purchase Agreement. And as to the post-sale collective-bargaining negotiations between Anchor and the Union, the Company is in effect saying that the Union, rather than do the best it could by sober measuring of negotiating realities, should have insisted—presumably by striking, if necessary—on the resurrection of the O-I-GMP Agreement. I do not believe that the Union was obligated, as a condition of being heard in this forum on the fulfillment of O-I's promise under Article 33, to push Anchor for the rescission of its January 5 announcement and attachment. I believe, rather, that the Company is making an argument which is to be rejected as adding up to plain burden-switching.

Seventh and last, though it may add up to reiteration, I want explicitly to deal with the suggestion the Company is making that Anchor should be treated as the party which is liable. The Company suggests this by arguing that Section 13(b) of the Asset Purchase Agreement, while it rendered Anchor free not to assume the collective-bargaining Agreement, did not absolve Anchor from its responsibility under Article 33 and does not constitute the basis of a defense for Anchor in a claim that Anchor violated its obligation under Article 33. Though true that "be binding upon the purchaser" is part of the language of Article 33 and though true that Anchor, having been aware of the language of Article 33, could no more properly have entered into the terms of Section 13(b) than the Company, I view the Company as once more engaged in burden-switching. In the first place, as previously pointed up, the pledge under Article

33 was made by the Company. The pledge cannot be viewed as ceasing to be the Company's burden where it is broken, not after the plant becomes the purchaser's and after the Company has made the sale in the good-faith belief that the collective-bargaining Agreement would be assumed by the purchaser, but before the consummation of the sale and with the Company's participation. And in the second place, ownership of the plant and control over its destiny lay with the Company, not Anchor. The Company was free to continue to operate the plant, to sell it, or to shut it down. But each of these courses had the contractual consequence which the Company and the Union had agreed to. What the Company was *not* free to do was to go with one or another of these courses without observance of the particular course's contractual consequence. And this is precisely what the Company here did. Rather than simply say "no" to Anchor in observance of the Article-33 pledge, the Company permitted Anchor to purchase the plant on the stipulation that Anchor would not be bound by the Agreement. Having itself been the facilitator of the violation of Article 33, the Company cannot legitimately argue that it should escape liability—at least not vis-a-vis the Union's claim against the Company. There is no evidence that the Company, in agreeing to the terms of Section 13(b), gave Anchor to understand that the liability would be Anchor's if Article 33 were to be found to have been violated. But if this or something like it happened, the burden for collecting on it would be the Company's, not the Union's.

Raised by the foregoing is the remedy question. Neither party has addressed it. The Union merely raises it as a question, and the Company confines itself to the

given denial of Company liability. As is true of any other remedy question, the technically correct answer is to undo what has wrongfully taken place. Here, however, this would mean: the voiding of the sale as an improper act under Article 33, the retroactive application of the O-I-GMP Agreement through its expiration date with whatever make-whole consequences might be involved, and the retroactive negotiation of a new O-I-GMP Agreement, with the former O-I-GMP Agreement as the base from which the parties would have negotiated for the new Agreement, with whatever make-whole consequences this would entail if it is assumed that wages and benefits would have been increased under the new Agreement, and with recognition of the possibility that there might have been no new Agreement by virtue of a prolonged deadlock between the parties. It would be an exercise of enormous difficulties, raising an endless array of elusive questions and likely throwing the parties into protracted and costly litigation. Neither party has asked for the unscrambling, and I am not disposed independently to impose it.

Rather, I will treat the other two issues in the case as linked with the violation of Article 33 and, in the light of the holdings I am making on them, as disposing of the remedy question under Article 33. On the one hand, as will be seen, those two issues simply could not have arisen if the Agreement had remained in effect while the plant continued to operate (under either O-I or Anchor auspices). And, on the other hand, the Union brought those two issues—and no others—in conjunction with the Article-33 issue. This being so, and there otherwise being nothing by way of a remedial suggestion respecting the Article-33 issue, the Union is properly held to what it is asking for on those two issues. Else, contrary to the

widely accepted finality precept in the arbitral forum, the Union would be permitted to have a second bite at the apple.

The next issue to be dealt with concerns Article 31 (Issue No. 2 under the Company's issue statement and Issue No. 1 under the Union's issue statement). Article 31 is titled "Severance Pay" and is composed of three paragraphs. The last two paragraphs need not be quoted. The first paragraph reads as follows:

> "If the Company elects to permanently close the Glassboro Plant or a department, severance shall be paid on the basis of 25 hours per credited year of service with a maximum of 750 hours payable."

The parties' respective positions recognize "permanently close" as the key phrase.

The Union submits: that the Company permanently ceased to operate the plant; that all of the plant's hourly employees were permanently separated from O-I employment; that they had no right to be employed by Anchor; that, in going to work as Anchor employees, they lost their Agreement rights and suffered substantial losses in benefits; that severance pay was among those losses—for, under the new Anchor-GMP Agreement, there is no severance-pay provision; that the plant operated as an O-I plant for many years and thus had employees of many years of loyal O-I service; that, as is true of any other fringe benefit, a severance-pay provision is obtained at the price of foregoing a wage increase or part of it—so that the wage rates which were in place at the time of the employees' separation from O-I employment and which were adopted by Anchor were lower than they would have been had the severance-pay

provision not been negotiated; and that, by proper appreciation of all of these considerations, the Company's resistance to the payment of the Article-31 severance pay is ill-founded and should be overruled.

Contrarily, the Company submits: that the Union is making a series of strained contentions in seeking to overcome the fact that the triggering event explicitly laid down at Article 31 is "permanently close"; that there was no closing of the plant—not even for a minute and not even with any sort of departure from normal operations; that all of the employees remained in plant employment; that they continued to be represented by the GMP, which soon negotiated a new Agreement for them; that the Union's reliance on employment termination is therefore fallacious in two ways: 1) neither termination nor layoff nor any other form of separation from employment is the specified criterion under Article 31, and 2) even that which traditionally is thought to justify severance pay—a tiding-over means for an individual who has lost employment and is seeking new employment—did not take place; that, likewise, the sale of the plant is not an event which makes Article 31 operative; that the language of Article 31 covers both the plant as a whole and a department thereof and that the Company recognized and implemented its obligation under Article 31 when, in 1986, the plant's can-lid department was shut down; that the Company's resistance to the payment of severance pay in the present case is consistent with a series of other instances involving other Company plants or divisions: 1) the Millville Sand Plant, which was closed prior to its sale (thereby warranting the payment of severance pay), 2) several Glass Container Division plants, which were closed (thereby warranting the payment of severance pay), 3) the Forest Products Division, which was sold but

not closed (thereby *not* warranting the payment of severance pay); and that it follows from all of the above that the Union is seeking a monumental windfall and is making a claim which should be rejected as lacking in merit.

Two things are to be granted. One is that, as already noted, the severance-pay provision could not possibly have become operative, with or without the sale of the plant and whether the operation of the plant would have been O-I's or Anchor's, had the Agreement been kept in effect. The employees' protection against a change in ownership during the life of the Agreement lay in Article 33, not Article 31. The other is that, by common understanding of the term, the plant was not permanently closed. What is commonly envisaged when that term is used is a plant which loses its viability, ceases its operation, and dismisses its workforce without expectation of ever again engaging it. The idea of severance pay, quite as its name suggests and quite as the Company argues, is to cushion the likely impact of such displacement. It may also be viewed as a reward for past service in the face of loss of employment. Here, both the plant and its operations stayed intact and there was no cessation—indeed, not even an interruption—in employment. And if it is granted—as it must—that the plant was not permanently closed within the usual meaning of the term, it must also be granted (in the absence of evidence respecting the negotiating discussions) that the plant was not permanently closed as the parties intended the term to be applied when they adopted Article 31.

But I do not believe that the inquiry can properly be made to end with the recognition that what here occurred was a sale rather than a permanent closing—or

with the further recognition that these are events which were treated as lying in contradistinction to each other under the parties' Agreement (namely, at Article 33 with one consequence and at Article 31 with another and very different consequence). For, if the inquiry were so ended, one would be overlooking the fact that the Company failed to respect the consequence which the Agreement prescribes for a sale—or, stated otherwise, that the sale was no more a sale within the meaning of the Agreement than the plant was permanently closed within the meaning of the Agreement. This is the real state of affairs in the case, and it is manifestly to be dealt with.

As indicated, I have determined that the severance pay called for by Article 31 is properly applied in rectification of the violation of Article 33. The following are the reasons.

First, as shown above, the application of the technically correct remedy would lead to a morass approaching impossibility and, judging by the parties' respective stances in the case, is not sought by either party. Specifically to be said, aside from what has already been said, is that the Company has not argued that the Article-31 rectification route may not properly be taken even if the Company were found to be liable for the violation of Article 33.

Second, the violation of Article 33 was an act which in effect abandoned the employees. There was immediate re-employment and thus less of the proximate impact than is likely to occur when an individual has to look elsewhere for employment upon the permanent closing of the plant at which he or she has been employed. But, in overall impact, the loss was severe and involved hardships which are not dissimilar to the hardships

which Article 31 is designed to cushion. Rather than remain in employment with every Agreement right kept intact, the employees: were permanently dismissed from O-I employment, had no right to be employed by Anchor, went to work under Anchor's unilaterally established terms, and ended up (judging by what evidence there is respecting the new Anchor-GMP Agreement) faring substantially worse than they would have fared had their rights under Article 33 been observed.

Third, I reject the Company's windfall characterization as one-sided and as thereby not standing up. I in no way mean to minimize the sum of money which is involved in severance pay under Article 31. It is a substantial sum—by my calculations of the tabulations contained in Union Exhibit 9, the average per-employee payment will be about $5,500 and the sum for the workforce as a whole will be about $2 million. But what is equally to be appreciated is that Anchor presumably insisted on Section 13(b) (or its equivalence) because it saw the non-assumption of the collective-bargaining Agreement as being of monetary value to it and that O-I's assent to the adoption of Section 13(b) was of influence, favorable to O-I, in arriving at the sum to be paid for the purchase of the plant. I am not saying that O-I's gain was in the amount of $2 million or is otherwise quantifiable in any sort of exact terms. But I think it is correctly assumed that Article 33 would have been honored as a matter of course had the honoring been painless for Anchor and that O-I's gain flowing from its assent to the adoption of Section 13(b)

was therefore more than minimal. In relation to the purchase price, it is to be observed, $2 million represents about 5½ percent. And when this is put alongside the above-discussed losses sustained by the employees, I believe that the windfall argument loses its force.

The last issue (Issue No. 3 under each party's issue statement) requires but brief treatment. Section 17 of Article 19 calls for a special pension-retirement benefit for employees in a certain age-service category "when the Company elects to close a plant permanently". I refrain from identifying the benefit in more precise terms because, owing to the potential juxtaposition as between the Article's Section 5 and Section 17, there may be a dispute between the parties as to the covered benefit under Section 17. There may also be a dispute between the parties on the Union's assertion that the covered employees would have been treated as eligible for retiree medical benefits. But these are refinements which need not here be addressed. The question which is posed is the interpretative question arising from the just-quoted language in Section 17. To be noted, however, is that the present issue involves but a handful of employees—apparently fewer than ten.

The just-quoted language constitutes the triggering language. It is not identical to the triggering language laid down at Article 31 but it is obviously of the same import. Neither party contends otherwise. Together with all the observations and conclusions contained in the discussion of the severance-pay issue, I make the same disposition.

DECISION

The grievance is disposed of as given in the accompanying Opinion. If implementing difficulties develop and cannot be resolved through consultation between the parties, either party is free to return the case to me for final resolution.

/s/ ROLF VALTIN
Rolf Valtin
Arbitrator

Dated: July 3, 1990

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING

(Dated August 15, 1991)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5159

GLASS, MOLDERS, POTTERY, AND ALLIED WORKERS INTERNATIONAL UNION; AFL-CIO; LOCAL UNION #4

v.

OWENS-ILLINOIS, INC.;

OWENS-ILLINOIS, INC.;
counter-claimant

v.

GLASS, MOLDERS, POTTERY, AND ALLIED WORKERS INTERNATIONAL UNION; AFL-CIO; LOCAL UNION #4
counter-defendant

OWENS-ILLINOIS, INC.

v.

GLASS, MOLDERS, POTTERY, AND ALLIED WORKERS INTERNATIONAL UNION; AFL-CIO, CLC
Owen-Illinois, Inc., Appellant

Appeal from the United States District
Court for the District of New Jersey
(Civil Action Nos. 90-03236 and 90-03291)

PRESENT: SLOVITER, *Chief Judge*, GREENBERG and SEITZ, *Circuit Judges*.

ORDER

The petition for panel rehearing, filed by appellant in the above captioned matter, having been considered by the judges who participated in the decision of this court, is hereby denied.

By the Court,

/s/ SEITZ
Circuit Judge